

Liquor Commission of Western Australia
(*Liquor Control Act 1988*)

- Applicant:** RDP Resorts and Hotels (WA) Pty Ltd
(*Represented by Mr Ian Curlewis of Lavan Legal*)
- Objectors:** There were 51 formal Notices of Objection lodged and the following objectors attended the hearing and were represented by Mr Graham Anstee-Brook
- Ms Laurie Snell
Mr Robert Herkes
Mr Graham Anstee-Brook
Ms Jill Carr
Ms Marion Herkes
Mr Clinton Vagg
Ms Diane Batey
Ms Judy Carroll
(for Preston Beach Progress Association Inc.)
Ms Jan Hall
Ms Donna Evans
Mr Len Carroll
Ms Therese Orrell
Mr Robert Evely
Mr Doug Hall
Mr Charles Batey
Ms Lovell Anstee-Brook
Mr Peter Garvey
Ms Maaike Hine
- Commissioners:** Mr Jim Freemantle (Chairperson)
Mr Eddie Watling (Deputy Chairperson)
Ms Helen Cogan (Member)
- Date of Hearing:** 25 January 2011
- Date of Determination:** 2 March 2011
- Premises:** Footprints Preston Beach Hotel
56 Mitchell Road, Preston Beach
- Matter:** Application for a Hotel Restricted Licence referred pursuant to Section 24 of the *Liquor Control Act 1988* ("the Act") by the Director of Liquor Licensing ("the Director") for hearing and determination by the Liquor Commission.

Determination:

The Commission is satisfied that the applicant has complied with all necessary statutory criteria, requirements and conditions precedent to the application being granted and accordingly pursuant to Section 30A of the Act, the application for a Hotel Restricted Licence by RDP Resorts and Hotels (WA) Pty Ltd for the premises Footprints Preston Beach Hotel is granted subject to the following conditions:

1. The permitted trading hours under the Licence are:
 - Monday to Sunday from 10.00 am to 10.00 pm;
 - On a New Year's Eve from 10.00am to 12 midnight;
 - On New Year's Day – from immediately after 12 midnight on New Year's Eve to 2.00am;
 - On Good Friday and Christmas Day – from 12 noon to 10.00pm, but only for liquor sold ancillary to a meal supplied by the Licensee;
 - On ANZAC Day – from 12.00 noon to 10.00 pm;
 - Any time to a lodger.
2. The permitted hours for the sale of liquor to a lodger are unrestricted.
3. The Licensed premises are defined as the area outlined in red on the plans attached to the application and dated 03 July 2009. A copy of that plan is to be retained on the premises and produced to any authorised officer if required.
4. The maximum number of patrons in the restaurant/bar area at any one time is limited to fifty (50) persons.
5. There is to be no liquor discounting or advertising of cheap liquor during the operation of the permit.
6. The sale of packaged liquor to persons other than lodgers is prohibited.
7. No liquor is to be sold or supplied for consumption on the premises in any of the following ways:
 - a) In any vessels with a measurement capacity exceeding 750ml and no spirits or spirit based beverages are to be supplied in vessels with a measurement capacity exceeding 375ml.
 - b) In either:
 - i. any non standard measures; or
 - ii. presented in such a way that would encourage rapid consumption of liquor (for example, but not limited to, unadulterated spirit or liqueur in a shot glass) or
 - iii. by virtue of their emotive title , such as 'laybacks', 'shots', 'shooters', 'test tubes', jelly shots, 'blasters' or 'bombs.'

- c) No liquor is to be mixed with energy drinks.

(For the purposes of this condition **energy drinks** has the same meaning as **formulated caffeinated beverage** within *Australia New Zealand Food Standards Code* with a composition of 145mg/l of caffeine or greater).

- 8. The number of special events organised or promoted by the Licensee shall not exceed twelve (12) in a calendar year.
- 9. Pursuant to section 104(3)(a) of the Act, approval is granted to the applicant to pay to the lot owners a proportion of the rent collected by the Applicant for the letting out of individual Licensed strata lots in accordance with the letting agreements entitled "Liquor Licensing Agreement –Footprints at Preston Beach" lodged with the Commission.

10. ENTERTAINMENT CONDITION

- 1. The licensee or manager, or an employee or agent of the licensee or manager, shall not -
 - (a) be immodestly or indecently dressed on the licensed premises;
 - (b) take part in, undertake or perform any activity or entertainment on the licensed premises in a lewd or indecent manner;
 - (c) exhibit or show, or cause, suffer or permit to be exhibited or shown, on the licensed premises any classified "R18+", "X18+" or "RC" publication, film, computer game or extract there from;
 - (d) cause, suffer or permit any person employed, engaged or otherwise contracted to undertake any activity or perform any entertainment on the licensed premises to be immodestly or indecently dressed on the licensed premises; or
 - (e) cause, suffer or permit any person to take part in, undertake or perform any activity or entertainment on the licensed premises in a lewd or indecent manner.
- 2. In this condition, "licensed premises" includes any premises, place or area -
 - (a) which is appurtenant to the licensed premises; or
 - (b) in respect of which an extended trading permit granted to the licensee is for the time being in force,

but does not include any part of the premises which is reserved for the private use of the licensee, manager or employees of the licensee and to which the public does not have access.

11. REGISTERS

The licensee must maintain on the licensed premises the following registers:

1. a register of prescribed incidents that take place at the licensed premises (section 116A of the Act and regulation 18EB refer); and
2. a register that records training compliance for all staff (section 103A of the Act and regulation 14AG refer).

These registers must be maintained in a form approved by the Director of Liquor Licensing. The licensee, or an employee or agent of the licensee of the business conducted under the licence shall, at the request of an authorised officer, produce the registers for inspection by that authorised officer.

12. COMPLIANCE WITH HARM MINIMISATION POLICY

The licensee has lodged a copy of the House Management Policy, Code of Conduct and Management Plan developed for these premises in accordance with the Harm Minimisation Policy. These documents must be retained on the licensed premises and produced to any Authorised Officer if required. Additionally, the licensee shall ensure that the premises' House Management Policy and Code of Conduct are displayed in a prominent position on the licensed premises.

Authorities considered in making the Determination:

- *Vandeleur v Delbra Pty Ltd [SASR (1988) 156]*
- *Executive Director of Public Health v Lily Creek International Pty Ltd (2000) 22 WAR 510 (Lily Creed No. 1).*
- *Cole v South Tweed Heads Rugby League Football Club Limited and Lawrence (2004) 217 CLR (No.14) Pty Ltd (t/as Tandara Motor Inn) and*
- *Another v Motor Accidents Insurance Board (Matter No. H7/2009)- (2009) 260 ALR 606*
- *Rowland, J at 38, Bluegate Nominees Pty Ltd v Clarrie Isaacs and ors (SCL 940704) unreported Full Court Supreme Court of WA 16 December 1994.*
- *Kapinkoff Nominees Pty Ltd v Director of Liquor Licensing [2010] WASC 345*

Background

1. On 3 July 2009, the Applicant gave notice of application for a Hotel Restricted Licence for the Premises.
2. On various dates between 24 August 2009 and 1 September 2009, 51 notices of objection to the application were lodged by individuals, including various residents of Preston Beach, owners of property in Preston Beach, frequent or occasional visitors to Preston Beach and in addition, by the Chairperson Strata Plan 8165 for 30 unit owners and the Preston Beach Progress Association. On 18 November 2010, the notice of objection lodged on 25 August 2008 by Ms Heather Jean Cochrane was withdrawn.
3. On 11 September 2009, the Commissioner of Police lodged a Notice of Intervention in the matter but on 2 December 2009 this notice was withdrawn.
4. On 19 October 2009, the Executive Director of Public Health, at the request of the Director lodged a report on the application but gave no Notice of Intervention.
5. On 23 October 2009, Mr Doug Smith, inspector with the Department of Racing Gaming and Liquor made a report on the premises to the Senior Premises Inspector of the Department.
6. On 15 November 2009, Australian Licensing Specialists, acting for the Applicant, lodged submissions to the Director in regard to objections lodged to the application. On 7 January 2011, a request that those submissions not be disclosed to parties was withdrawn by the solicitor for the Applicant.
7. On 18 February 2010, pursuant to section 24 of the Act, the Director referred the application to the Commission for hearing and determination and gave a Notice of Intervention which notice was withdrawn on 6 December 2010.
8. The application before the Commission was accompanied by the following documents:-
 - Public Interest Assessment (PIA) for Premises;
 - House Management Policy for Premises (as revised);
 - Code of Conduct for Premises (as revised);
 - Risk Assessed Management Plan for Premises (Liquor Control Act);
 - Section 39 (Liquor Control Act) Certificate of Local Health Authority in respect of Premises;
 - Section 40 (Liquor Control Act) Certificate of Local Planning Authority in respect of Premises;
 - Documents relating to title to the Premises, corporate details of the Applicant and shareholding in Applicant.
9. The following documents were also before the Commission:
 - Preston Beach Town site Strategy Project Brief (as amended July 2006);
 - Preston Beach Town site Strategy Visioning Workshop Report (May 2007);

- Preston Beach Town site Strategy Community Information Day Report (December 2006);
- Site Maps;
- Locality Maps (25 November 2006), photographs of Premises and surroundings (from the Preston Beach Progress Association Inc and from Applicant);
- Travel reviews, Media Release and advertising pages from Internet (from Preston Beach Progress Association Inc);
- Objectors Petition;
- Petition supporting the application;
- Inspector's Report (23 October 2009);
- St John Ambulance letter dated 18 January 2011.

The Hearing

10. The hearing was held as a consequence of the referral of the matter to the Commission by the Director pursuant to section 24 of the Act.

Objections

11. The contents of all objections to the Application were considered by the Commission. The relevant grounds set out in the objections can be summarised as follows:

Not in the public interest due to -

- nature of locality (isolated, small, quiet) in which premises is situated unsuitable for a Hotel Restricted Licence;
- lack of Police, Medical and Ambulance facilities at Preston Beach;
- adverse impact on amenity, quiet and good order of locality if application granted due to increased availability and consumption of alcohol leading to antisocial behaviour and harm/ ill health including unacceptable increase in noise levels, traffic problems (the premises are situated on the only access road to and from the locality) and including pressure on car parking facilities.

Lack of need for a licence –

- present facilities for sale of liquor in Preston Beach adequately cater for residents of the town including customers of the premises and visitors to the town;
- Security problems – many homes in the town are holiday homes vacant for periods of time – risk of burglary and vandalism;
- Proximity of premises to residential properties.

12. The Preston Beach Progress Association Inc lodged a petition containing 54 signatories objecting to the Application.

Submissions

13. The submissions lodged by the Applicants and the Objectors were thorough and were carefully considered by the Commission.

Applicants PIA and Submissions

14. In its PIA the Applicant refers to the provisions of Section 38 of the Act which in summary states that an applicant for a licence must satisfy the licensing authority that granting the application is in the public interest and sets out the matters the licensing authority may have regard to in determining whether granting an application is in the public interest.

15. Section 38 (4)(2) states:

- (2) *An applicant who makes an application to which this subsection applies must satisfy the licensing authority that granting the application is in the public interest.*

Section 38(4) states:

- (4) *Without limiting subsection (2), the matters the licensing authority may have regard to in determining whether granting an application is in the public interest include —*
- (a) *the harm or ill-health that might be caused to people, or any group of people, due to the use of liquor; and*
 - (b) *the impact on the amenity of the locality in which the Licensed premises, or proposed Licensed premises are, or are to be, situated; and*
 - (c) *whether offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the Licensed premises or proposed Licensed premises; and*
 - (d) *any other prescribed matter.*

16. In its PIA the Applicant dealt in some detail with the following matters in relation to the Application

- likely health and social impacts;
- impact on amenity;
- offence, annoyance, disturbance or inconvenience.

17. In a letter (lodged 15 November, 2009) to the Director from its representative Australian Licensing Specialists, the Applicant made submissions in regard to the objections received to the Application. In summary these submissions addressed the following issues raised in the objections

- alleged conduct of the current Licensee of the Preston Beach General Store (Mr Clinton Vagg) concerning the manner in which the objections to the application were formed;
- alleged increase in drunks, crime and drink driving;
- alleged increase in vandalism and attraction of criminals;

- effect on viability of Preston Beach General Store;
- noise problems;
- lack of public transport;
- effect on native Fauna and Flora;
- effect on residents who are retirees;
- effect of traffic congestion.

Submissions in support of the Application

18. The Applicant provided
 - an affidavit from Mr Mark Hain a Director of the Applicant, sworn on 7 January, 2011;
 - letter dated 6 January 2011 from Faye and Alan Simpson;
 - letter dated 12 January 2011 from Mr Rodney Blakiston.

19. The affidavit of Mr Mark Hain contained details relating to
 - the geographical situation of the premises and what the premises comprises;
 - the BYO facilities at the premises;
 - the proposed trading conditions of the premises and the proposed (liquor) trading hours – amended from those proposed in the Application to 10:00am to 12:00 midnight Monday to Saturday and 10:00am to 10:00pm Sundays;
 - the proposed sale of liquor (to residents within their accommodation units at the premises) and packaged liquor to bona-fide resident guests;
 - some objections allegedly being prompted or facilitated by assistance from Mr Clinton Vagg, an objector who is also a director and approved manager of the Licensee of the Preston Beach General Store;
 - reference to
 - no recognition in the Act of the commercial validity of other licence premises as a ground of objection
 - excessive noise generation if application is granted
 - increased risk of drink drivers
 - increased anti social behaviour
 - denial that application was ever represented as an application for a Restaurant Licence
 - difficulty of obtaining packaged liquor due to trading hours kept by Preston Beach General Store
 - Hansard report of 2 April 2009 of statement by Honourable E Constable then Minister for Tourism in relation to continued private investment in the accommodation sector “with the opening of a new resort at Preston Beach over the weekend”;
 - The Applicant lodged a Petition containing 586 signatories in support of the Application.

Objectors Submissions

20. In addition to the grounds contained in its initial written objection, the following additional written submissions were made by Preston Beach Progress Association Inc:
- on 16 January 2011 (filed 18 January 2011) in response to the Applicants submission filed on 11 January 2011;
 - on 16 January 2011 (filed 18 January 2011) in response to the affidavit by Mark Hain sworn on 7 January 2011;
 - On 18 January 2011 additional documents to be included as part of submissions by the Preston Beach Progress Association.
21. In addition to the grounds contained in their initial objection on 18 January 2011 Mr Clinton Vagg and Ms Gwenda Vagg made additional submissions in response to the affidavit by Mr Mark Hain sworn on 7 January 2011.
22. At the hearing following oral submissions were made by or on behalf of the following objectors at the hearing
- Mr Clinton Vagg
 - Ms Lovell Anstee-Brook
 - Mr Peter Garvey
 - Ms Maureen Snell
 - Mr Charles Batey

Applicants Responsive Submissions

23. On 21 January 2011, the applicant filed responsive submissions concerning inter alia the grounds for objection and the objectors submissions, in particular ground for objection and submissions filed by:
- Ms Laurie Snell
 - Mr Steve Hiller
 - Mr Charles and Ms Diane Batey
 - The Preston Beach Progress Association Inc
 - Ms J Carrol (Preston Beach Progress Association Inc) in relation to her comments on the affidavit of Mark Hain
 - Mr Clinton Vagg (letter of 18 January 2011)
24. In summary, the responsive submissions dealt with the following issues:
- speculative nature of objections;
 - viability of Preston Beach General Store;
 - impact on amenity of the area;
 - live entertainment;
 - restaurant licence as an alternative to Hotel Restricted Licence;
 - disregard of tourism factor;
 - status of the Preston Beach Progress Association Inc;
 - response to objectors comments on affidavit of Mr Mark Hain;
 - response to Mr Clinton Vagg's letter of 18 January 2011.

Reasons for Decision

25. The Commission has given close and careful consideration to the conflict that exists between the desires of the local Preston Beach community members who have objected to this application and the intent of the Applicant to provide an expanded service for the supply and consumption of liquor sourced from the restaurant and bar area of the Footprints Preston Beach Hotel.
- 26 In the normal course an application of this type, based on the style of facility and operation provided by Footprints Preston Beach Hotel, would more than likely be successful, particularly where there have been no objections or Notices of Intervention lodged by regulatory authorities viz. Department of Health, Western Australian Police.
- 27 The granting of a Hotel Restricted Licence would be in accordance with the objects of the Act, specifically section 5(1)(c):
- To cater for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.
- 28 The fact that there are 51 individual residential objectors does, however, require the licensing authority to closely evaluate whether granting the application is in the public interest in accordance with section 38(2) and 38(4) of the Act.
- 29 The grounds of objection relied upon by the objectors are that the grant of the application would not be in public interest (section 74(1)(a) of the Act). Specifically, the tenor of the objections relates to sections 38(4)(b) and 38(4)(c) of the Act:
- 38(4) (b) the impact on the amenity of the locality in which the Licensed premises, or proposed Licence premises are, or are to be, situated;
- 38(4)(c) whether offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the Licensed premises or proposed Licensed premise.
- 30 While the written submissions and further oral submissions at the hearing by the objectors raised various grounds for the objections, based primarily on 29 above, it is apparent that the main issue is the scope of Hotel Restricted Licence to allow for non residents of the hotel to consume liquor in a bar setting from 6.00am until midnight Monday to Saturday and 10.00am to 10.00 pm Sunday (application later amended to 10.00 am until midnight Monday to Saturday).
- 31 It was not disputed that liquor is currently consumed on the premises, both as BYO within the restaurant/bar area, and by means of individual private supplies brought to the units that make up the tourist/holiday resort.
- 32 It was not disputed that even with the granting of the licence; patrons would continue to bring their own liquor supplies to their individual holiday units.

- 33 The main objection therefore was not in relation to the consumption of liquor in either the restaurant/bar area of the hotel, or within individual units, but the proposal to allow non-residents to utilise the premises in the style of a traditional bar. The objectors have, however, made the point that even under the current BYO method of operation there are noise issues, generated by both the patrons and the entertainment provided for them.
- 34 The major concerns of the objectors relate to the effect of this licence on the amenity of the area through the increased patronage that a Licensed bar would be expected to attract, the hours of operation of the liquor service to midnight on most days, the increased traffic and associated noise linked to non-residential patrons, the potential for the Licensee to greatly increase and amplify the entertainment to attract such patrons and the open visual presentation of the bar area to passers-by.
- 35 Arguments based on the potential negative impact on the viability of the adjacent Preston Beach General Store, through the hotel being able to sell packaged liquor to the residents of the resort, have not been considered by the Commission, which has no mandate to include business, economic or competitive factors in its deliberations.
- 36 In reaching its determination, the Commission has taken the following into consideration:
- the nature, style and quality of the accommodation, service and recreational facilities which are such as to create customer expectation that a Licensed liquor service would be available;
 - a Departmental Inspector's report dated October 23, 2009 stating - "Subject to the Schedule of Requirements the premises are suitable for a Hotel Restricted Licence". The Schedule of requirements listed four matters of a general nature that would need to be rectified;
 - whilst not rated under the STAR Ratings Australia scheme the property is being presented at the 4 star level which, for official rating purposes, requires a Licensed restaurant/café - open seven days a week;
 - the restaurant/café area currently operates on a BYO basis and there have been no registered objections to past activities;
 - a number of objectors have indicated that they have no issue with a restaurant Licence being granted;
 - packaged liquor is acquired off the property and consumed in association with occupancy of the units, a situation that has been acknowledged will continue regardless of the granting of a liquor Licence;
 - the applicant seeks a restricted hotel Licence, not a full hotel Licence, so restricting the sale of packaged liquor to lodgers only;
 - Preston Beach is a small community which experiences an influx of visitors during peak holiday periods;

- a large percentage of the Preston Beach permanent community are people in retirement and/or those that have sought a “quiet” lifestyle;
- the police and medical services available to Preston Beach are limited and generally need to be sourced from the town of Waroona, making it difficult to respond adequately to any anti social issues that might be associated with increased liquor consumption;
- the Shire of Waroona has not sought to object or intervene in the application process;
- the Shire, in its original developmental approval, has applied a condition requiring the maximum number of persons to be catered for in the restaurant/café area at any one time, to be 50 persons;
- the Applicant has submitted that there is no intention to provide live bands and the number of special functions to be conducted annually would relate only to a few events like the Melbourne Cup, the AFL Grand Final and holiday festivals such as Christmas and New Year.

37 The Commission, in reaching its decision, was required to balance the competing interests of the applicant and the local community objectors as set out in 36 above and has determined that it is in the public interest to grant the Hotel Restricted Licence with conditions that recognise the aspirations of a large percentage of the local community who have concerns as to the impact on the character of what has traditionally been considered a tranquil coastal retreat.

38 Footprints Resort is an established property which received developmental approval in 1998, following a planning process that involved wide community consultation, including a Preston Beach Townsite Strategy Visioning Workshop held in May 2007.

39 The Commission has a responsibility to draw its own conclusions in relation to planning decisions – *Kapinkoff Nominees Pty Ltd v Director of Liquor Licensing* {2010} WASC 345 para 60 – and finds that there is no basis to challenge the planning process that approved the development of the Footprints Resort.

40 Therefore, as an extension of that developmental approval and the subsequent development of the resort, it is reasonable to expect that a licensed liquor service would be appropriate for, and integral to, this style of property.

41 Notwithstanding that the objectors are of the view that a restaurant licence may be appropriate in the circumstances, the Commission has concluded that the application for a Hotel Restricted Licence can be justified on the basis that it is in the public interest to;

- Allow residents of the resort to have the benefits of a communal restaurant/bar area that is able to provide a traditional bar service;
- Allow residents of the resort to acquire packaged liquor for their private consumption in the resort;
- Make available a Licensed venue for use by both local residents and visitors to Preston Beach;

- Bring the supply and consumption of liquor within the resort under the jurisdiction of the *Liquor Control Act 1988*;
- Grant a liquor licence that is conducive to the proper development of the liquor, tourism and hospitality industries, yet is restrictive in its application i.e. a liquor Licence that primarily caters for residents of the resort and is conditioned appropriately with regard to non-residential patrons.

43 As a final comment, the Commission acknowledges the issues that arise when new developments are planned or occur in locations that have generally been considered to be quiet and passive, with local communities feeling threatened by the potential for lifestyle changes. The Commission is not insensitive to these circumstances, however, and has a responsibility to weigh the competing interests to assist the evolving roles that areas like Preston Beach play for the wider community.

44 The conditions imposed in the granting of a Hotel Restricted Licence to the Footprints Preston Beach Hotel are therefore directed towards managing these changing circumstances and to allow for a controlled transition towards an increased service level by the resort, an initiative considered to be in the public interest.

45 In view of the type of Licence and the conditions applied, the Commission did not consider it necessary to impose any additional security provisions, as requested by a number of objectors.

A handwritten signature in black ink, appearing to read 'Jim Freemantle', written over a horizontal line.

JIM FREEMANTLE
CHAIRPERSON